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In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES MALCOLM BEARDEN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5-6; R. 86-87) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1960 (Pet. App. 7; R. 88). The petition for a writ of certiorari was filed on May 21, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to show that petitioner disposed of sugar for which he did not file a required return.

STATUTE INVOLVED

26 U.S.C. (1952 ed., Supp. V) 5213, 68A Stat. 639, provided:

> Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Secretary or his delegate, render a correct return, in such form and manner as the Secretary or his delegate may by regulations prescribe, showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information which the Secretary or his delegate may require as to each such disposition, as will enable the Secretary or his delegate to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid. As used in this section—
>
> (1) the term "distilled spirits" includes all products referred to in section 5002(b); and
>
> (2) the term "substance of the character used in the manufacture of distilled spirits" includes, but not by way of limitation, molasses, corn sugar, cane sugar, and malt sugar.

* * * * * * * * *

STATEMENT

Petitioner was charged in a one-count indictment returned in the United States District Court for the Northern District of Georgia with wilfully failing and refusing to render a correct return as to the disposition of 183 100-pound bags of sugar in violation of 26 U.S.C. 5213 and 26 U.S.C. 5609 (R. 2). The jury found him guilty as charged (R. 75). He was sentenced to imprisonment for a period of twelve

months, but execution of the sentence was suspended and he was placed upon probation for a period of two years (R. 76-77). On appeal (R. 77-78), the conviction was affirmed (Pet. App. 5-6).

Petitioner was the purported operator of a grocery business in Dawson County, Georgia. He used a barn as a warehouse where he stocked sugar, rye meal, barley malt, yeast, and fruit jars, but no groceries or canned goods (R. 54-55). On September 1, 1955, petitioner was directed to submit to Howell, a delegate of the Secretary of the Treasury, returns showing dispositions of quantities of 100 pounds or more of sugar, these returns to be mailed or delivered not later than the business day following the date of disposition (R. 10-12; Gov. Ex. 1).

On June 13, 1958, federal agents of the Alcohol and Tobacco Tax Division observed petitioner's tractor-trailer being loaded with 100-pound bags of sugar at the platform of the Crystal Sugar Company in Atlanta, Georgia (R. 13). When questioned, petitioner showed a bill of sale from Crystal Sugar Company for 300 100-pound bags, and stated that he would place the sugar in his warehouse at Dawsonville, Georgia, for sale to local stores (R. 14, 17, 22). The agents followed the truck and saw that the trailer was left near a house occupied by one Roland on petitioner's land (R. 17-18, 37, 42-43, 49).

From June 14 to June 23, the agents had the trailer under surveillance, but did not see anyone remove sugar from it (R. 19, 29, 26, 44). On the night of June 16, while the agents were conducting their surveillance, petitioner fired a shot with his pistol. He told the agents he was tired of people coming around and making so much noise. When an agent

stated that some "legitimate merchant" might want his sugar, petitioner remarked that as long as the agents were watching, no one was going to pick up the sugar (R. 26-27). Petitioner did not answer a question as to where he kept his records (R. 19). On the night of June 21 two agents, with the aid of a flashlight, looked into the rear window of the trailer and saw only about 114 bags of sugar (R. 49).

On June 23, after a federal search warrant had been obtained, the agents entered the trailer and found 117 100-pound bags of sugar, *i.e.*, 183 of the original 300 were missing (R. 20-21, 29). None of the missing sugar was found in any of the other buildings on the premises (R. 21). The agents observed foot tracks from the rear of the trailer to a fence about forty yards away, and tire tracks from the other side of the fence to the public highway (R. 21, 30, 37, 39, 40).

Petitioner did not file a return showing the disposition of the 183 bags of sugar on any date between June 14 and June 23, 1958 (R. 51). Later he filed returns showing sugar sales on June 28, 29, and 30 to one Willie A. Shelton, Route 3, Dawsonville, Georgia (R. 15, 53, 59; Gov. Ex. 4). A federal agent attempted to find Shelton by contacting post office workers, the sheriff, the clerk of the court, and other Dawsonville residents, but was unable to locate anyone who knew him (R. 53-54). At a later date the agent asked petitioner where he could locate Shelton, but petitioner gave no answer to this question (R. 56). Petitioner told the agent that the officers had stolen the missing sugar. The agent testified that to his knowledge that was not true (R. 55-56).

ARGUMENT

Petitioner's sole contention is that there was insufficient evidence of a disposition of the missing 183 bags of sugar, so that he was not required to make a return as provided in 26 U.S.C. (1952 ed., Supp. V) 5213, *supra*, p. 2.

At petitioner's request, the judge charged that "disposition" as used in the indictment meant "a parting with the title of the property involved and not the mere removal of the same from his place of business" (R. 70). Thus, the jury, in convicting petitioner, necessarily found that title had been conveyed in the disposition of the sugar. This finding was supported by the evidence. The foot tracks, mashed grass, and tire marks in the vicinity of the parked trailer indicated that there had been activity in disposing of the sugar, which disappeared and was unaccounted for. The evidence, although circumstantial, was sufficient to show a disposition of the sugar and therefore to support the conviction. Cf. *United States* v. *Mu'tari*, 109 F. 2d 438, 440-441 (C.A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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